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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner,

v.

FRANCES B. DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC), with the consent of all parties, respectfully submits this brief as *Amicus Curiae.*

INTEREST OF THE *AMICUS CURIAE*

EEAC is a voluntary non-profit association organized as a corporation under the laws of the District

of Columbia to represent and promote the common interests of employers and the general public in the development and implementation of sound government policies and procedures to ensure nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Many of EEAC's members participate in federally subsidized programs of various types and therefore are subject to § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. V 1975). In addition, most of EEAC's members are federal contractors subject to § 503 of the Rehabilitation Act, 29 U.S.C. § 793 (Supp. V 1975), a companion statute which, unlike § 504, does not use the term "discrimination," merely requires affirmative action "to employ and advance in employment qualified handicapped individuals," and expressly provides for an administrative remedy for noncompliance, 29 U.S.C. § 793(b). Despite the significant differences in these statutes, this Court's resolution of the jurisdictional and substantive issues in this § 504 case will strongly influence the interpretation of similar issues in the § 503 context because of the employment aspects of the present case. For example, the district court found that the respondent's "handicap actually prevents her from

safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential danger to future patients in such situations." 424 F.Supp. at 1345.

The EEAC's members are especially troubled by the court of appeals' inexplicable failure to take note of these findings and its apparent lack of concern about the implications of its decision for the future job safety of the handicapped individual herself, her co-workers, or her patients or customers. The Fourth Circuit and other courts of appeals have often emphasized, in other kinds of employment discrimination cases, the importance of safety and efficiency considerations even though the employment practices at issue may have had adverse effects upon protected groups. *See, e.g., Condit* v. *United Airlines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978); *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied sub nom. Brennan* v. *Greyhound Lines, Inc.*, 419 U.S. 1122 (1975).

In addition, the members of the EEAC are concerned about the unsupported summary holding of the court of appeals that Section 504 requires "affirmative conduct" even where "expensive," and also about the holding that Section 504 confers a private right of action on alleged victims of handicap discrimination. Both holdings have important implications for employers.

The EEAC sought and was granted permission by this Court to file a brief as *amicus curiae* in the case of *Cannon* v. *University of Chicago*, No. 77-926, now awaiting decision by the Court, which concerns the analogous question of whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, provides an implied private right of action for a rejected student applicant for a graduate professional program.

On numerous other occasions, EEAC has been granted permission by this Court to file briefs as *amicus curiae*. *See, e.g.*, *Furnco Construction Corp.* v. *Waters*, 98 S.Ct. 2943 (1978); *Gardner* v. *Westinghouse Broadcasting Company*, 98 S.Ct. 2451 (1978); *Shell Oil Company* v. *Dartt*, 434 U.S. 99 (1977); and *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

STATUTES AND RULES INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> (Pub.L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394.)

H.E.W. Regulations implementing Section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84:

> §84.3 *Definitions*
>
> As used in this part, the term:
>
> * * * *
>
> (k) "Qualified handicapped person" means:
>
> * * * *
>
> (3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376:

> *Definitions*—5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

STATEMENT OF THE CASE

This case arises under Section 504 of the Rehabilitation Act of 1973, U.S.C. § 974, which provides, in part:

> No *otherwise qualified* handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (Emphasis added).

Plaintiff applied for Southeastern Community College's nursing program. Because of severe hearing impairment, the school determined she was not qualified for the program. The school's primary concern was for the safety of patients. It felt, for example, that she would be unable to lip read during surgery or be able, generally, to pick up critical sound clues in life and death situations. Plaintiff then filed suit against the school, alleging she was discriminated against because of her handicap.

The district court dismissed the suit. In construing the words "otherwise qualified," the court relied on their common meaning. It read Section 504 as not allowing the exclusion of a handicapped person from a federally assisted program solely by reason of the handicap, "unless the nature of the handicap renders the person unable to fully and effectively participate in the activity." 424 F.Supp. at 1345. Stated otherwise, the court held that "otherwise qualified" can only be read to mean "otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and

available." *Id.* Applying these standards, the court ruled that even with special assistance, plaintiff would be unable to perform the nursing function properly.

The district court found from the evidence that it would be "difficult and, in fact, dangerous for plaintiff to even attempt the clinical portion of the training program". 424 F.Supp. at 1345. The primary, but by no means only, danger of which the court was speaking was the potential peril to patients under her care as a student nurse or a putative registered nurse:

> Her handicap actually prevents her from safely performing in both her training program and her proposed profession. The trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly. Of particular concern to the court in this case is the potential danger to future patients in such situations.[1]

The Fourth Circuit reversed. First, it held that there is a private right to sue under Section 504. Second, it remanded the case for reconsideration of the plaintiff's application *without regard to* her hearing disability. It ruled that the district court should focus only upon her academic and technical qualifications. Third, it stated that, on remand, the district court should determine what "affirmative relief" would be appropriate so that the school could be

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[1] A nurse unable to respond to warning sounds in a busy hospital, surrounded by physically and mentally ill, where emergency situations are the rule, not the exception, could easily find herself in danger, and in addition, pose a safety problem to her co-workers, either as a student trainee or as a graduate job-holder.

ordered to accommodate the hearing disability. This would include additional training and supervision "even when such modifications become expensive." 574 F.2d at 1162.

SUMMARY OF ARGUMENT

Section 504 does not prevent a recipient under a federally assisted program from establishing qualification standards which ensure the safety and efficiency of the recipient's operations. The decisions of this Court, HEW's regulations and common sense indicate that the applicant must be qualified *in spite of the* handicap, rather than *without regard to* the handicap. Nor does the statute, which merely proclaims a policy of nondiscrimination, require recipients to undertake costly preferential accommodations for the handicapped. Because there is no "accommodation" language in the statute in question and the costs of complying would be enormous rather than *de minimis*, the decision below is at odds with the decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

Furthermore, handicapped individuals do not have a right to sue private recipients for failing to undertake such "affirmative conduct," or for refusing to jeopardize patient safety by making exceptions to admissions standards. The exclusive remedy for legitimate grievances of qualified handicapped individuals lies with the Department of Health, Education and Welfare pursuant to the procedures of Title VI of the Civil Rights Act of 1964. Judicial review of an adverse agency determination is limited to consideration of whether the agency's action was arbitrary or capricious or unsupportable by substantial evidence on the record as a whole.

ARGUMENT

I. Section 504 should not be construed to prevent a recipient of federal assistance from establishing qualifications standards which ensure the efficiency and safety of the recipient's operations.

If the Fourth Circuit's decision is allowed to stand, it will have immediate and direct consequences for employers. The Fourth Circuit ignored the factual findings of the district court and imposed an affirmative conduct standard upon employers which has no support in the relevant statutory language. It also construed the term "otherwise qualified" in a manner which could have a serious impact on safety and efficiency. As shown below, this construction is directly at odds with proper standards for determining business necessity, which include consideration of factors such as the safety and efficiency of the employer's operations.

The district court adopted a common sense approach under which an applicant's qualifications would be judged on the basis of whether that person was qualified *in spite of* the handicap. Similarly, the Department of HEW's analysis of the regulation directly in point omits the word "otherwise" from the definition of qualified. The agency reasoned that those persons protected by the statute should include only those who are qualified "in spite of their handicap," rather than qualified "except for" their handicap. See H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376 (set forth *supra*, p. 5). The reason for this approach was to avoid a result which clearly was unintended by Congress. Under H.E.W.'s example, a blind person possessing all the qualifications for driv-

ing a bus except sight could not be said to be otherwise qualified for the job of driving. (*Id.*)

The court of appeals, however, did not review the district court's factual findings under the usual "clearly erroneous" standard—which, in light of this record, could only have resulted in affirmance—because the court held that the district court erred as a matter of law in considering the nature of the petitioner's disability *at all.* 574 F.2d at 1161; App. at 6a. Further, although purporting to base its ruling on the text of an HEW regulation, 45 C.F.R. § 84.3 (k) (3), together with an explanatory comment from HEW, the Fourth Circuit apparently missed the point of the additional HEW commentary (at 42 Fed. Reg. 22686) on the very issue involved in this case, whether the statutory phrase "otherwise qualified" means qualified *without regard to* the handicap, or qualified *in spite of* the handicap. The court, though it apparently referred to the key commentary by HEW in footnote 7 of its opinion, either rejected or ignored HEW's conclusion that the phrase must mean qualified *in spite of* the handicap. The court of appeals, in adopting the "without regard to" test, arrived at precisely the result the agency viewed as improper. Both a blind bus driver (HEW's example) and a deaf nurse may well be "qualified" for their putative jobs if considered "without regard to" their handicaps—but Congress could not possibly have intended that the individuals be placed in positions requiring sight or hearing just as if their disabilities were imaginary.[2] HEW's interpretation was entitled

[2] The Fourth Circuit's interpretation, in contrast to HEW's, could require an employer to hire drug addicts and alcoholics, and a nursing college to accept applicants addicted to alcohol

or drugs, "without regard to" their addiction. Because of the revolutionary implications of the inclusion of addicts within the Rehabilitation Act's definition of handicap, the initial draft of HEW's Section 504 regulations was met with a deluge of comments expressing shock and concern. *Cf. Connecticut General Life Ins. Co.* v. *Department of I.L.H.R.*, 18 F.E.P. Cases 1447, 1452 (Wis.Sup.Ct. 1979) ("If his drinking was volitional it can hardly be classified as a handicap within the meaning of [the Wisconsin] anti-discrimination statute."). HEW responded with the following more reasonable position which has now been implicitly struck down by the Fourth Circuit's ruling in this case:

> The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

42 Fed. Reg. at 22686 (1977). Congress, moreover, has itself rejected the Fourth Circuit's "without regard to" test, at least insofar as addicts are concerned, by amending the Rehabilitation Act's definition of "handicapped individual" to provide: "For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alco-

to deference by the Fourth Circuit, *see Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971), particularly since the other interpretation does not comport with common sense. This Court has often held that a "literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose." *United States* v. *Ryan*, 284 U.S. 167, 175 (1931).[3]

Ms. Davis was applying not for a passive classroom position but for a clinical training program. Thus, her application to Southeastern Community College's nursing program was in large part an application for a job, analogous to an apprenticeship. The assessment of her qualifications by the College necessarily took into account not only her prospective job performance as a student trainee, but also her probable efficiency as a registered nurse. Assuming, therefore, that the clinical training program is at least in part federally funded, and that Section 504 applies to admissions despite the employment aspects

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hol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." P.L. 95-602, 92 Stat. 2983, Section 122 (Nov. 6, 1978).

[3] *Accord, Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892); *Sorrells* v. *United States*, 287 U.S. 435, 446-48 (1932) (collecting cases); *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U.S. 315 (1938); *United States* v. *American Trucking Assns.*, 310 U.S. 534, 543 (1940); *United States* v. *Shirey*, 359 U.S. 255 (1959); *Perry* v. *Commerce Loan Co.*, 383 U.S. 392 (1966).

of the program,[4] the concerns which this Court has expressed in employment discrimination cases for "safe and efficient job performance"[5] are highly relevant.

Under Title VII of the Civil Rights Act of 1964, an employer need only articulate some legitimate, nondiscriminatory reason—such as concern for safety or efficiency—for the use of a selection criterion, to rebut a prima facie case that the employee is a member of a protected class and the selection criterion has a substantial adverse impact upon members of that class.[6] *Board of Trustees of Keene State College* v. *Sweeney*, —— U.S. ——, 99 S. Ct. 295 (1978). Under the Rehabilitation Act of 1973, however, which makes no explicit provision for private suits but instead creates administrative remedies,[7]

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[4] *See Trageser* v. *Libbie Rehabilitation Center, Inc.*, 18 F.E.P. Cases 1141 (4th Cir. 1978), holding that Section 504 authorizes regulation of employment practices only where a primary objective of the federal financial assistance is to provide employment. *See also* Wright, "Equal Treatment of the Handicapped by Federal Contractors," 26 Emory L.J. 65, 66 n.6 (1977).

[5] *Dothard* v. *Rawlinson*, 433 U.S. 321, 331-32 n.4 (1977).

[6] This case does not raise the important question of whether the Rehabilitation Act requires proof of invidious discriminatory intent. Section 504 by its terms prohibits only that discrimination against *qualified* applicants which is "solely" on the basis of an alleged handicap which does not itself render the applicant unqualified to perform the job or to participate in the program.

[7] In 1978, the Act was amended to grant an explicit right to sue to federal employees under Section 501, but Section 504 claimants were expressly limited to administrative remedies under the Title VI procedures. P.L. 95-602, 92 Stat. 2982, Section 120 (November 6, 1978). *See infra* pp. 35-36.

the protected class is defined in terms of qualifications for particular jobs or programs; that is, protection is limited to "qualified" handicapped individuals. The applicant or employee thus has the burden of proving to the Department of Labor (Section 503) or to HEW (Section 504) that he is qualified for the particular job or program. He must show that he comes within the coverage of the statute before the agency can even proceed to the question of discrimination *vel non*.[8] Thus, a showing of the job-relatedness of a particular physical selection criterion comparable to the showing that would exonerate an employer under Title VII despite adverse impact, must certainly suffice to clear the criterion from a charge of handicap discrimination. This result should obtain unless the applicant or employee can show either that the physical requirement is a mere pretext for intentional discrimination, or that he is qualified for the particular job despite his failure to meet the standard and there

[8] *See, e.g., Rogers* v. *Frito-Lay, Inc.*, 433 F.Supp. 200, 202 (N.D. Tex. 1977) (Section 503), *appeal pending*, No. 77-2443 (5th Cir.), *citing* S.Rep. No. 93-1297, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, at 6390: "[S]ection 503 itself relates to employment and thus the adjective 'qualified' in modification of 'handicapped individual' clearly requires that the 'employability' of the handicapped individual in question is a prerequisite to section 503 application." Because Section 504, like Section 503, limits its protection to those who are "qualified," a Section 504 complainant must likewise prove his qualification for the federally-subsidized job he applied for.

Even under Title VII, of course, an applicant must prove, as part of his prima facie case, that he "was qualified for a job for which the employer was seeking applicants." *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973).

is some "practical way reliably to differentiate the qualified from the unqualified applicants" in the class of persons who fail to meet the standard. *Cf. Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976) (maximum age rule for bus drivers held justified despite the possibility that certain individuals over that age might in fact be qualified).

It has been held in the Title VII context that certain physical job requirements are so "manifestly job-related" that the "employer need not make an evidentiary showing of business necessity, even though the criterion may have a discriminatory impact." *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977) (en banc) (good back required for manual labor):[9]

> The need for a manual laborer to have a good back is such a criterion. Smith argues that he was able to do the work. That begs the question when an employee has a defective back condition. *Roberts* v. *St. Louis Southwestern Ry.*, 329 F.Supp. 973, 975-977 (D.Ark. 1971). Common knowledge and experience reflect the problems degenerative backs create for employer, employee and fellow employee alike. As noted in one text, an employer who hires an employee with a latent back defect is "asking for trouble." . . .

[9] No empirical validation is needed to justify certain other types of manifestly job-related criteria besides physical ones. *See, e.g., McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 806-07 (employee's previous participation in a "stall-in" justifies refusal to reemploy); *Subia* v. *Colorado and Southern R. Co.*, 565 F.2d 659, 663 (10th Cir. 1977) (strict leave policy in order to maintain a continuity of work flow is a business necessity).

> The manifest job-relatedness of a requirement that a manual laborer have a good back is bolstered by the frequency with which physical fitness requirements generally have been found to be valid. . . .

555 F.2d at 1287-88 (citations omitted). The court supported these conclusions with numerous citations to cases affirming the facial validity of various (though not all) physical fitness requirements in many different contexts, including the Section 504 context.[10]

The need for a student nurse or a registered nurse to be able to hear is likewise manifestly job-related. As the district court in this case noted, the "trial testimony indicated numerous situations where plaintiff's particular disability would render her unable to function properly." 424 F.Supp. at 1345. Even if the court of appeals could properly have ignored this testimony and disregarded the trial judge's findings, it should have held as a matter of law that a hearing requirement for a student nurse or a registered nurse is manifestly job-related and therefore not illegal as applied to this applicant.[11]

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[10] *Coleman* v. *Darden*, 13 E.P.D. ¶ 11,502 (D.Colo. 1977) (blind person denied job as law clerk), cited by the Fifth Circuit, 555 F.2d at 1288 n.6.

The Department of Labor's Chief Administrative Law Judge, The Hon. H. Stephan Gordon, recently cited *Smith* v. *Olin* in dismissing a Section 503 complaint on behalf of an applicant with a history of back trouble for a job as a carpenter's apprentice. *OFCCP* v. *E.E. Black, Ltd.*, Case No. 77-OFCCP-7R, U.S. Dept. of Labor, Recommended Decision and Order (Sept. 13, 1978), p. 16.

[11] A blanket qualification rule would be justified in these circumstances. However, it should be noted that in this case the college did not merely point to the rule, but gave Ms. Davis an individual examination to determine the probable impact of her hearing disability on her ability to function as a student nurse and, ultimately, as a registered nurse.

As shown below, factors such as safety and efficiency are highly relevant in determining the necessity for an employer's qualification standards. The facts of this case, however, focus more directly on safety concerns which have dictated the outcome of many employment discrimination cases. The mere possibility of jeopardizing life or personal safety often has been held sufficient to defeat an attack on a physical job qualification requirement. For example, in *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974) (age discrimination), *cert. denied sub nom. Brennan* v. *Greyhound Lines, Inc.*, 419 U.S. 1122 (1975), the Court held that the carrier was not required to "experiment with the lives of passengers," *id.* at 865, and that:

> [T]he paramount goal of a bus carrier is safety. . . Greyhound must demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers. Greyhound need only demonstrate however a minimal increase in risk of harm for it is enough to show that elimination of the hiring policy *might* jeopardise the life of one more person than might otherwise occur under the present hiring practice.

499 F.2d at 863 (emphasis added). Likewise, in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976) (age discrimination), the Fifth Circuit held:

> We emphasize safety in busing just as we would in a variety of other industrial areas where safety to fellow employees is of such humane importance that the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must of course show a reasonable basis for its assessment of risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound. Priceless as is a single human life in our concept of the value of human life and our undoubted unwillingness ever to approve a practice which might kill one but not, say, twenty, we think the safety factor should be evaluated in terms of the possibility or likelihood of injury/death.

Other courts have exonerated physical fitness requirements for other employees responsible for the care and safety of passengers, such as airline pilots and flight attendants.[12] Not only physical requirements, but also academic achievement criteria may be proper when human risk is a factor, especially "in fields of scientific training in which risks to human life are involved." *Townsend* v. *Nassau County*

[12] *Boyd* v. *Ozark Air Lines, Inc.*, 568 F.2d 50 (8th Cir. 1977) (pilots); *Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972) (pilots); *Condit* v. *United Airlines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (flight attendants); *Harriss* v. *Pan American World Airways, Inc.*, 437 F.Supp. 413, 435 (N.D. Cal. 1977) (flight attendants). *Cf. Florey* v. *Air Line Pilots Assoc., Int.*, 439 F.Supp. 165, 172 (D. Minn. 1977) (rejecting private cause of action for alcoholics).

Medical Center, 558 F.2d 117, 122 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978) (college degree requirement for blood bank technician not inherently discriminatory). As the Second Circuit stated in *Townsend*, "the relative function of the academic prerequisites to job-relatedness varies inversely with the risk to the health and safety of the public who depend upon the technology." *Id.* at 120.

Given the importance placed by the Second, Fourth, Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals on safety considerations in the above discrimination cases involving bus drivers,[13] flight attendants, and blood bank technicians, the Fourth Circuit's total disregard in the present case of the safety of the future patients is even more remarkable than its decision to disregard or reject an agency's interpretation and a district judge's fact findings, in order to arrive at its conclusion.[14]

[13] The New York courts have held that a hearing defect is related to ability to drive a school bus, and therefore a person with such a defect who applies for such a job is not covered by that state's Human Rights Law. *State Division of Human Rights* v. *Averill Park Central School District*, 59 A.D.2d 449, 399 N.Y.S.2d 926 (1977).

[14] One state court, dealing with a state handicap discrimination law in a case which did not involve a question of the safety of patients or customers, held that the Oregon statute imposes "upon an employer the obligation not to reject a prospective employee because of a physical or mental handicap unless there is, because of the defect, a probability [not merely a "reasonable possibility"] either that the employee cannot do the job in a satisfactory manner or that he can do so only at the risk of incapacitating himself." *Montgomery Ward & Co.* v. *Bureau of Labor*, 280 Or. 163, 570 P.2d 76 (Or.Sup. Ct. 1977). Leaving aside the question of the court's

As the Seventh Circuit emphasized in *Hodgson* v. *Greyhound Lines, Inc., supra,* and the Fifth Circuit stressed in *Usery* v. *Tamiami Trail Tours, Inc., supra,* where there is evidence of even a mere possibility that human life might be jeopardized by removing a qualification for employing persons entrusted with the care of others' lives, courts should not tamper with the employer's standards. Courts should be especially hesitant to substitute their judgments about the existence of such a possibility for the professional judgment of the staff of a hospital or nursing school.[15] This Court has expressed its concern for "maximum safety for the patient" in another context as follows:

> The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.

Roe v. *Wade,* 410 U.S. 113, 150 (1973). Furthermore, a hospital is under a duty "to exercise reasonable care to safeguard the patient from any known or reasonably apprehensible danger from himself and to exercise such reasonable care for his safety as his mental and physical condition, if known, may require," [16] and situations are not difficult to foresee in which a nursing employee without the ability to hear would simply not become aware of the audible indications of self-destructive tendencies of a disturbed patient, or of the symptoms of other patients. *See, e.g.,* 42 C.F.R. § 405.127(c)(1)(i) [HEW regulation for Medicare program which defines "skilled nursing services"].

The uncontradicted testimony in this record shows that there are many situations in which a nurse with a severe hearing deficiency like that of Ms. Davis would not be able to assure the safety of the patient, to observe and assess the total needs of the patient, or to provide unerringly timely treatment and other direct services to the patient. The decision of the court of appeals ignored these considerations and should therefore be reversed. Unless such reversal occurs, the decision below could result in the courts disregarding legitimate considerations of safety and efficiency that would appear in other factual contexts.

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unjustifiable disregard of the safety of the employee himself, it is clear from *Hodgson* and *Brennan* that the federal courts have rejected this sort of "preponderance of the evidence" approach to justifying physical job requirements in favor of a "possibility" test where safety factors are involved. The *Hodgson* court remarked that Greyhound need not "experiment with the lives of passengers." 499 F.2d at 865.

[15] *Cf. Fitzgerald* v. *Porter Memorial Hospital,* 523 F.2d 716 (7th Cir. 1975) (Stevens, J.) (upholding hospital rule excluding expectant fathers from delivery room for safety reasons despite differences in medical opinion as to existence of safety risks). *See also Furnco Construction Corp.* v. *Waters,* —— U.S. ——, 98 Sup. Ct. 2943, 2950 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.").

[16] *Bornmann* v. *Great Southwest General Hospital, Inc.,* 453 F.2d 616, 621 (5th Cir. 1971).

II. The court of appeals erroneously held that Section 504 imposes an obligation to undertake "affirmative conduct" on behalf of the handicapped.

Section 504 merely requires that recipients of federal financial assistance not discriminate against otherwise qualified handicapped individuals solely on the basis of their handicap. Section 504 does not contain any requirement to make "reasonable accommodations" to the needs of an "otherwise qualified handicapped individual." HEW, however, has promulgated a regulation under Section 504 which purports to impose such a requirement on recipients with respect to their employment practices, 45 C.F.R. § 84.12, and a number of other regulations, *e.g.*, 45 C.F.R. § 84.22 (modification of existing facilities), § 84.23 (new construction), and § 84.44(d) (auxiliary aids), which will require, according to HEW's own estimate, an expenditure of at least $3.2 *billion* annually on behalf of handicapped individuals by institutions which participate in federally-funded programs.[17] Thus, on the basis of a one-sentence statute prohibiting "discrimination," HEW has mandated extremely expensive preferential treatment.

However, neither 45 C.F.R. § 84.12 (employment practices), which purports to govern Southeastern's treatment of student trainees, nor any regulation requiring accommodations (such as auxiliary aids and program and facility modifications) is authorized by

[17] *See* O'Neill, Discrimination Against Handicapped Persons—The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance (May 4, 1977) (unpublished report prepared for the HEW Office for Civil Rights under Orders #SA-4141-76 and #SA-2471-77), p. 65.

the statute. To the extent "reasonable accommodation" would cause a recipient to incur more than a negligible expense,[18] the requirement is preferential rather than non-discriminatory. HEW's regulations thus not only exceed the statute's mandate; they violate it. These regulations unlawfully attempt to bootstrap a failure to make preferential accommodations into discrimination[19]—whereas, in the absence of a finding of illegal discrimination, there cannot possibly arise any statutory duty to implement preferential remedies.[20]

[18] The Fourth Circuit noted that such accommodation could "become expensive." 574 F.2d at 1162.

[19] HEW's definitional legerdemain is remarkable. The initial version of the regulations defined "qualified handicapped person" as "with respect to employment, a handicapped person who can perform the essential functions of the job in question." Proposed 45 C.F.R. § 84.3 (k)(1), 41 Fed. Reg. at 20305 (1976). The next draft added the phrase "with reasonable accommodation," 41 Fed. Reg. at 29561, so that the final regulation reads: "with respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question." 42 Fed. Reg. at 22680. Such administrative dilution of the statutory requirement that the individual be qualified before he comes within the protection of Section 504, much less before any accommodations are considered, is unjustified—as is the attempt to redefine qualification to encompass only the "essential functions," rather than all functions, of the job. In the 1978 amendments Congress rejected the "essential functions" approach at least insofar as alcoholics and drug abusers are concerned, by making it explicit that such persons are not covered by the Act if their condition prevents them "from performing the duties of the job in question." P.L. 95-602, 92 Stat. 2983, Section 122 (Nov. 6, 1978).

[20] *See, e.g., Furnco Construction Corp.* v. *Waters, supra,* at 2950. ("Title VII forbids [the employer] from having as

In the first section of this brief it was shown that the Fourth Circuit incorrectly failed to give weight to HEW's interpretation of the statutory language "otherwise qualified." The regulations now under consideration, however, neither are authorized by Section 504, nor further its nondiscrimination mandate. Nor does the "reasonable accommodation" regulation 45 C.F.R. § 84.12, promulgated only 22 months ago, on May 4, 1977, represent a consistent longstanding interpretation of Section 504's requirements.[21] Thus, this Court's recent comments in *International Brotherhood of Teamsters* v. *Daniel*, —— U.S. ——, 47 U.S.L.W. 4135, 4138 n.20 (1979), are directly in point:

> It is a commonplace in our jurisprudence that an administrative agency's consistent, longstanding interpretation of the statute under which it operates is entitled to considerable weight. . . . This deference is a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time. But this deference is constrained by our

a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.").

[21] The "reasonable accommodation" requirement does not appear in, and would appear to be inconsistent with, the Veterans Administration guidelines, 38 C.F.R. § 21.70(c)(2)(1976), to implement statutes designed to restore private employability "to the extent consistent with the degree of disablement, lost by virtue of a handicap due to service-connected disability." 38 U.S.C. § 1501(2) (1970).

> obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history.

The clear meaning of Section 504 is to prohibit discrimination, not to mandate preferences. Section 504 contains no language which would require the estimated $3.2 billion annual expenditure which HEW seeks to impose on recipients. The Fourth Circuit's summary conclusion that a "requirement of affirmative conduct" [22] is justified "even when such modifications become expensive," 574 F.2d at 1162, disregards the "language, purpose and history" of Section 504.

This Court previously has had occasion to construe a requirement of reasonable accommodation for religious practices imposed by the 1972 amendments to Title VII of the Civil Rights Act of 1964. In *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), the provision at issue was 42 U.S.C. § 2000e(j):

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or

[22] The phrase "affirmative conduct" is a rather imprecise judicial hybrid. It is unnecessary in this case to compare the concept of reasonable accommodation, which appears in the regulations for Section 504, in the regulations for Section 503, and in the Title VII definition of religion, 42 U.S.C. § 2000e(j), with the concept of affirmative action, which appears in the text of Section 503, in the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2012(a), and in Executive Order No. 11246, all of which apply to federal contractors.

practice without undue hardship on the conduct of the employer's business.

Even in that context, where (unlike the situation under Section 504) Congress clearly placed a reasonable accommodation burden on employers, and First Amendment free exercise considerations might weigh on the side of a duty to accommodate, this Court held that an employer need not incur more than a *de minimis* cost[23] to accommodate the employee's religious practice. Anything beyond that would be unreasonable, or, differently stated, would constitute an undue hardship on the employer.

In *Hardison* this Court questioned whether, prior to the 1972 amendments, the EEOC had authority to issue a "reasonable accommodation" regulation at all under Title VII's mere prohibition of discrimination on the basis of religion. 432 U.S. at 76 n.11 (1977). The Court mentioned several cases holding that there was no duty to accommodate prior to the enactment of 42 U.S.C. § 2000e(j), and found the EEOC regulation "defensible" in retrospect only because a subsequent Congress amended Title VII itself to require

[23] *Hardison* held that the $150 cost of overtime wages to accommodate the employee for three months exceeded the *de minimis* standard. Lesser costs—indeed, any cost—may also constitute undue hardship on the employer. In *Fesel* v. *Masonic Home of Delaware, Inc.*, 447 F.Supp. 1346 (D. Del. 1978), the only reported case to analogize the *Hardison de minimis* concept into the area of sex discrimination, in the context of defining the extent of the burden on an employer to establish a bona fide occupational qualification defense, the court cited *Hardison* for the proposition that "where a duty of accommodation exists, it nevertheless falls short of requiring the employer to sacrifice either efficiency or wages to accommodate the employee." *Id.* at 1354 n.12.

reasonable accommodation short of undue hardship for the religious (and no other) needs of employees. *Id.* It is important to note that though Congress amended Section 504 in 1978 and adopted HEW's view of the limited application of Section 504 to drug abusers and alcoholics, it did not adopt HEW's interpretations of Section 504 to require reasonable accommodations in the employment context or other expenditures by recipients in non-employment contexts. Insofar as the regulations purport to require such accommodations or expenditures or other "affirmative conduct," therefore, they exceed HEW's authority and cannot be relied upon to support the Fourth Circuit's decision below.

III. The Court should not imply an additional private judicial remedy under Section 504, beyond the right to seek judicial review of adverse agency action.

The single sentence of Section 504 does not explicitly bestow on anyone a right to bring suit in federal court. Because of the similar wording of Section 504 to that of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, and of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*,[24] the issues of whether private causes of action may be judicially implied under each of

[24] Two important differences between Section 504 and both Titles VI and IX are that Section 504 explicitly protects only *qualified* handicapped individuals and only prohibits discrimination *solely* on the basis of a handicap. In addition, because handicaps differ widely in nature and degree of severity, there are unique substantive problems with the very concept of "handicap discrimination," in contrast to the traditional contexts of discrimination based on race or sex. *See infra*, Section III(B).

these statutes, according to the standards of *Cort* v. *Ash*, 422 U.S. 66 (1975), are closely related. The Title IX implication issue, of course, is currently under consideration in the case of *Cannon* v. *University of Chicago*, No. 77-926, in which EEAC has also filed a brief as *amicus curiae*.

If a right of action of the type asserted by Ms. Davis were implied under Section 504, the potential plaintiffs would include an indiscernible and possibly vast number of persons whose characteristics are only vaguely defined by the Rehabilitation Act, 29 U.S.C. § 706(6) (Supp. V 1975). No one is a perfect physical or mental specimen. Although not all citizens are in fact handicapped individuals who are qualified for particular programs or jobs, many allegations to that effect would be likely to survive a motion to dismiss and necessitate voluminous discovery and lengthy trials. *See, e.g., Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Such a staggering judicial expansion of federal jurisdiction must be precluded by a proper construction in this case of the language, history and purpose of Section 504.

A. ***Nothing in the legislative history of the Rehabilitation Act of 1973 or its two amendments supports the implication of a right of action under Section 504 for private individuals against private recipients of federal funds, but much supports the restriction of judicial participation in enforcement to a limited review of administrative proceedings in suits against the Department of Health, Education and Welfare.***

Section 504 as originally enacted in 1973 had only one sentence of legislative history, which referred to

the provision as a mere policy proclamation.[25] The portions of the legislative history of the 1974 Amendments to the Rehabilitation Act that were quoted extensively in *Lloyd* v. *RTA*, 548 F.2d 1277, 1285-86 (7th Cir. 1977), and mentioned in Mr. Justice Stevens' opinion in *Regents of the University of California* v. *Bakke*, —— U.S. ——, 98 S.Ct. 2733, 2815 n.27 (1978), show that Congress intended the enforcement provisions for Section 504 to be patterned after the Title VI regulations, 45 C.F.R. Parts 80 and 81, which neither provide nor contemplate a private cause of action for alleged victims of discrimination against alleged violators. Senate Report No. 93-1297[26] includes the following sentence:

> This approach to implementation of section 504, which closely follows the models of [Title VI and Title IX], would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

The *Lloyd* court expressly stated that this last phrase "contemplates judicial review of an adminis-

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[25] S. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2123, stated: "The bill further includes a provision proclaiming a policy of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." *See Snowden* v. *Birmingham-Jefferson County Transit Auth.*, 407 F.Supp. 394, 397 (N.D. Ala. 1975), *aff'd.*, 551 F.2d 862 (5th Cir. 1977).

[26] 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6373, 6391.

trative proceeding as contradistinct from an independent cause of action in federal court," 548 F.2d at 1286. The entire passage from the Senate Report is a directive to the Department of Health, Education and Welfare to enforce Section 504 as it was already enforcing Title VI and Title IX. If HEW should arbitrarily and capriciously abuse its enforcement powers, an aggrieved recipient of federal financial assistance would clearly be entitled to obtain judicial review of agency action, the "judicial remedy through a private action" contemplated by Congress. The defendant in such an action would be HEW, not the recipient of federal funds,[27] and review would be limited to the administrative record, to determine whether the agency's action was arbitrary or capricious or unsupportable by substantial evidence on the record as a whole. *See Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

The legislative history of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978[28] confirms that alleged discriminatees may not enter federal court except to

[27] The Administrative Procedure Act, 5 U.S.C. §§ 701-706, providing for judicial review of agency action, allows suits against agencies but not private parties. *See, e.g., Thomas* v. *DeVilbiss*, 408 F.Supp. 1357 (D. Ariz. 1973). Thus, persons alleging a failure of an agency to eradicate discrimination by the regulated entities must file suit against the agency, as in *NAACP* v. *Federal Power Comm.*, 425 U.S. 662 (1976), not against the regulatee. The courts have long recognized the "merit in confining [Title VI] litigation to the public agencies." *Taylor* v. *Cohen*, 405 F.2d 277, 283 (4th Cir. 1968).

[28] P.L. 95-602, 92 Stat. 2955, 2982, 2984.

seek review of adverse administrative action pursuant to the Administrative Procedure Act. Though Section 120(a)(1) of those Amendments explicitly grants a private right of action to alleged victims of handicap discrimination in federal employment, Section 120(a)(2) rejects that approach for Section 504 complainants and instead merely codifies the HEW regulation, 45 C.F.R. § 84.61, which made available to Section 504 complainants the procedures of Title VI —which, again, do not provide for or contemplate a private cause of action for alleged victims of discrimination directly against alleged violators. Section 120(b) of the Amendments then provides for discretionary awards of attorney's fees to a prevailing party "in any action or proceeding to enforce or charge a violation of" Section 504. This provision refers to administrative proceedings pursuant to the incorporated Title VI regulations, together with the limited judicial review authorized by Title VI itself, 42 U.S.C. § 2000d-2. Like the portion of the legislative history of the 1974 amendments which was construed by the Seventh Circuit in *Lloyd*, these provisions of the 1978 amendments contemplate "judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court." 548 F.2d at 1286.

Nothing in the legislative history of the 1978 amendments indicates otherwise. Neither Senator Cranston, 124 Cong. Rec. S15590 (daily ed. Sept. 20, 1978) nor Senator Stafford, 124 Cong. Rec. S18999 (daily ed. Oct. 14, 1978) indicated that the new Section 504 provisions contemplated anything more than the existing right to seek judicial review of administrative action. To the contrary, Senator Cran-

ston clearly distinguished the provisions of the Amendments applicable to Section 504 from those applicable to Section 501, which explicitly extended Title VII rights and remedies—and exhaustion requirements—to qualified federal employees who are victims of handicap discrimination. Congress obviously knew how to create an independent judicial remedy for persons covered by Section 504, but again refused to do so, just as it had so often in the past rejected similar proposals in the form of amendments to Title VII. *See* Exhibit "A."

In sum, there is no evidence whatsoever in Section 504's history of a Congressional intent to provide for the type of private suit for damages and injunctive relief against a private university which the court of appeals permitted in this case. The 1978 amendments, like the passage from the history of the 1974 amendments which was discussed in *Lloyd*, can be read in no other way than to restrict the scope of judicial participation in Section 504 enforcement to a limited review of administrative proceedings. In other words, Congress intended to foreclose private litigation about alleged handicap discrimination by recipients of federal financial assistance until a final agency determination has been made. Congress is entitled to assume that the judiciary will recognize the "balance, completeness, and structural integrity" of its statutes and abstain from interference with the "careful blend of administrative and judicial enforcement powers" [29] contained in Title VI and incorporated by reference (in the 1974 Senate Report and in Section 120 of the 1978 amendments) into Section 504. This Court has

[29] *See Brown* v. *GSA*, 425 U.S. 820, 823 (1976).

never demanded that Congress insert into a statute or its legislative history a sentence to the effect that "no court shall imply any additional remedies hereunder" as a precondition to its refusal to "expand the coverage of the statute to subsume other remedies." [30]

B. *Implication of a private right of action under Section 504 would interfere with the legislative purposes of the Rehabilitation Act.*

The Rehabilitation Act of 1973, as amended, is not a civil rights statute but rather a massive appropriations law aimed both at subsidizing handicapped—especially severely handicapped—individuals and developing new programs to assist in their integration into society. There is no indication in the text or legislative history of the Rehabilitation Act or its two amendments that anyone other than the federal government must bear the expense for these subsidies and programs. Appropriations under the Rehabilitation Act for fiscal year 1973 were estimated by the Senate to be $698 *million.*[31] It is inconceivable that by including the one-sentence policy statement of Section 504 Congress intended *sub silentio* to impose on recipients of federal financial assistance (not earmarked to pay accommodation costs) a multi-*billion* dollar burden [32] to restructure American educational and industrial facilities and practices to accommodate "otherwise qualified handicapped individuals."

[30] *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

[31] S. Rep. No. 93-318, *supra*, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS at 2124.

[32] *See* p. 22 & n.17, *supra*.

It likewise stretches credulity to believe that Congress also intended for all who fit within the definition of 29 U.S.C. § 706(6) to be able to use the federal courts to force recipients to make and bear the expense of such accommodations. That definition is intentionally broad to ensure that no worthy person is denied access to the federally assisted programs, not to maximize the pool of potential plaintiffs for judicially-invented lawsuits.

Because the concept of handicap discrimination is novel and complex, Congress has consistently refused to amend Title VII, which includes explicit rights to sue, to include handicap as an additional prohibited ground of discrimination.[33] Judicial implication of a private right to sue under Section 504 would defeat the legislative purpose that, before federal courts become involved, HEW be given a chance, within the legal confines of its statutory mandate, to explore alternative ways of aiding qualified handicapped individuals to participate in programs which are federally financed. This is no simple task, as former HEW Secretary Mathews explained in a letter accompanying the publication of the initial version of the proposed Section 504 regulations:

> Section 504, however, differs conceptually from both titles VI [of the Civil Rights Act of 1964] and IX [of the Education Amendments of 1972]. The premise of both title VI and title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504 questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required.[34]

Handicaps differ widely in kind and degree, and there is no readily identifiable and homogeneous class of handicapped persons. The Rehabilitation Act's definition of the handicapped, 29 U.S.C. § 706(6) (Supp. V 1975), is so broad that discrimination would have to be defined in terms of disparate treatment of differently and uniquely handicapped individuals. This analysis becomes hopelessly complex because there is no fixed reference class with which treatment of others can be compared.

Congress showed its caution in this new field by limiting the application of Section 504 to "otherwise qualified handicapped individuals" who face disparate treatment "solely" on the basis of handicap, and by rejecting attempts to amend Title VII, which does include an explicit private right of action, 42 U.S.C. § 2000e-5(g), to add handicap as a prohibited ground

[33] *See* Exhibit "A."

[34] 41 Fed. Reg. at 20296 (1976).

of discrimination.[35] And by incorporating the procedures and remedies of Title VI, with their explicit exclusion of employment practices from coverage, into Section 504, Congress showed that it did not wish for employment discrimination lawsuits to arise under Section 504. *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 18 F.E.P. Cases 1141 (4th Cir. 1978). In fact, regulation of employment practices, such as the nursing apprenticeship in this case, is an area in which the courts have been particularly averse to the implication of private judicial remedies under federal statutes and executive orders.[36] Judicially created employment litigation under the Rehabilitation Act would present, in the words of the court in *Lloyd* v. *RTA*, *supra*, 548 F.2d at 1286, "the unseemly vista of a spotty application of *ad hoc* remedies in lawsuits in various regions of the country." In view of the cautious approach of Congress in this new area, and because Congress chose to establish an administrative scheme for handling these claims, rather than to provide for private causes of action, this Court should not create a direct judicial forum for resolving these complicated problems.

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[35] See Exhibit "A" hereto, and *Rogers* v. *Frito-Lay, Inc.*, 433 F.Supp. 200 (N.D. Tex. 1977), *appeal pending*, No. 77-2443 (5th Cir.) (no implied private right of action under Section 503). *Accord, Wood* v. *Diamond State Telephone Co.*, 440 F.Supp. 1003 (D. Del. 1977); *Moon* v. *Roadway Express, Inc.*, 439 F.Supp. 1308 (N.D. Ga. 1977), *appeal pending*, No. 77-3263 (5th Cir.).

[36] *See, e.g.*, the cases collected in *Rogers* v. *Frito-Lay, Inc.*, *supra*, 433 F.Supp. at 202 n.1.

IV. A claimant must exhaust available remedies with the Department of Health, Education and Welfare before filing suit in federal court.

The present case does not directly raise a question of exhaustion of remedies with an administrative agency. At the time Ms. Davis filed her suit, HEW had not promulgated its final Section 504 regulations, which incorporate the Title VI procedures, 45 C.F.R. § 84.61, nor had Congress explicitly incorporated the Title VI procedures into the statute itself, as it did in 1978. The district court found that Ms. Davis had amply pursued her remedies with the college itself, and the court of appeals agreed. The court of appeals recommended, however, that the district court on remand consider the issues of exhaustion and primary jurisdiction. The EEAC does not take a position about whether administrative exhaustion should be required of this particular plaintiff, if she otherwise has a right to be in federal court, because the record does not show what remedies were in fact available from HEW prior to May 4, 1977, when the HEW regulations were issued. Subsequent claimants, however, must be required to exhaust the Title VI remedies provided by the HEW regulations.

It has long been established that no one can bring any kind of suit under Title VI without first exhausting administrative remedies under 42 U.S.C. § 2000d-2. *Green Street Association* v. *Daley*, 373 F.2d 1, 8-9 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967).[37] Title VI is the model statute for Section

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[37] Accord, *Cave* v. *Beame*, 433 F.Supp. 172, 174 (E.D.N.Y. 1977); *Johnson* v. *County of Chester*, 413 F.Supp. 1299, 1310-11 (E.D. Pa. 1976); *Green* v. *Cauthen*, 379 F.Supp. 361, 378

504, and its remedial provisions were in 1978 explicitly incorporated by Congress into Section 504. The statutory schemes for Title VI and Section 504 contain a "careful blend of administrative and judicial enforcement powers," *see Brown* v. *GSA*, *supra*, 425 U.S. at 832-33. The Title VI exhaustion requirement applies alike to alleged victims of discrimination, as in the cases above, and to alleged violators of the statute, as in *School Dist. of City of Saginaw, Michigan* v. *HEW*, 431 F.Supp. 147 (E.D. Mich. 1977). Furthermore, a complainant must *fully* exhaust administrative remedies. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767-68 (1947).[38]

The 1978 amendment to Section 504 shows that Congress intended that Title VI's explicit remedies and the body of law establishing the prerequisites to such remedies to be carried over into the area of handicap discrimination under Section 504. Title VI's exhaustion requirement should therefore be applied to all persons attempting to assert a Section 504 claim after May 4, 1977. *See, e.g., Doe* v. *New York University*, 442 F.Supp. 522 (S.D.N.Y. 1978).

Ms. Davis herself should also be required to pursue her claims, if any, with HEW, but pursuant to the

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(D.S.C. 1974); *Feliciano* v. *Romney*, 363 F.Supp. 656, 672-73 (S.D.N.Y. 1973); *Dupree* v. *City of Chattanooga*, 362 F.Supp. 1136, 1141-42 (E.D. Tenn. 1973).

[38] The doctrine of exhaustion of remedies applies to constitutional as well as statutory civil rights claims. *See, e.g., Lance Roofing Co.* v. *Hodgson*, 343 F.Supp. 685 (N.D. Ga.) (3-judge court), *aff'd*, 409 U.S. 1070 (1972); *Torres* v. *Taylor*, 456 F.Supp. 951 (S.D.N.Y. 1978).

doctrine of primary jurisdiction. If she were to be thought to have a light to be in federal court at all under the standards of *Cort* v. *Ash*, and she had exhausted whatever remedies were available to her within the College and with HEW, the doctrine of primary jurisdiction requires nonetheless that the complicated factual issues involved in her claim be considered and determined by HEW in the first instance. Meanwhile, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64 (1956).[39] This doctrine has already been applied to Section 504 claims by at least one district court, *Crawford* v. *University of North Carolina*, 440 F.Supp. 1047 (M.D.N.C. 1977). It is particularly appropriate to the complex area of handicap discrimination.[40]

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[39] *See also Far East Conference* v. *United States*, 342 U.S. 570, 574-75 (1952); *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 469-70 (1959); *Mississippi Power & Light Co.* v. *United Gas Pipe Line Co.*, 532 F.2d 412, 417-419 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *Usery* v. *Tamiami Trail Tours, Inc., supra*, 531 F.2d at 239-48 (Brown, J., concurring); Jaffe, "Primary Jurisdiction," 77 Harv.L.Rev. 1037 (1964).

[40] *See, e.g.*, former HEW Secretary Mathews' comments at 41 Fed. Reg. at 20296 (1976), quoted in Section III(B), *supra*.

V. Conclusion

In this case, the Court is presented for the first time with several extremely important substantive and procedural issues in the new area of handicap discrimination. The EEAC respectfully submits that the decision of the court of appeals should be reversed, and that this Court's opinion should make it clear that Section 504 does not interfere with legitimate business necessity requirements such as safety or efficiency, does not require preferential accommodations, does not give rise to an implied private right of action, and does provide administrative remedies which must be exhausted before a federal court may review a claim of handicap discrimination under Section 504.

Respectfully submitted,

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EXHIBIT A

Unsuccessful Attempts to Amend the Civil Rights Act of 1964 to Add Handicap as a Prohibited Ground of Discrimination

93d Congress (1973-74)

Bill	Sponsor
S. 1780	Pell
H.R. 1120	Roybal
H.R. 2685	Hicks
H.R. 10960	Tiernan
H.R. 11986	Hicks & 24 others
H.R. 11987	Hicks & 10 others
H.R. 12654	O'Brien
H.R. 12916	Moakley
H.R. 13199	Hicks & 21 others
H.R. 13200	Hicks & 18 others

94th Congress (1975-76)

Bill	Sponsor
S. 1311	Pell
S. 1757	Weicker
H.R. 1346	O'Brien
H.R. 1886	Matsunaga
H.R. 2515	Hicks
H.R. 3497	Roybal
H.R. 4624	Hicks & 23 others
H.R. 4625	Hicks & 24 others
H.R. 4626	Hicks & 6 others
H.R. 5016	Hicks & 8 others
H.R. 7061	Dodd
H.R. 7754	Hicks & 3 others
H.R. 7758	Lehman
H.R. 7946	Dodd & 4 others
H.R. 8028	Beard & 19 others
H.R. 8417	Beard & 5 others
H.R. 12591	Koch

95th Congress (1977-78)

Bill	Sponsor
S. 1477	Weicker
H.R. 264	Conte
H.R. 461	Le Fante
H.R. 1107	O'Brien
H.R. 1200	Rodino
H.R. 1995	Roybal
H.R. 3504	Edwards
H.R. 6619	Beard
H.R. 9477	O'Brien & 2 others
H.R. 9521	O'Brien & 15 others
H.R. 10198	O'Brien & 6 others

96th Congress (1979)

Bill	Sponsor
H.R. 373	Guyer
H.R. 609	O'Brien